

STATE OF MICHIGAN  
COURT OF APPEALS

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A COMPLETE HOME CARE AGENCY,

Plaintiff-Appellant,

v

THERESA GUTIERREZ and ATRIUM HOME  
AND HEALTH CARE SERVICE, INC.,

Defendant-Appellees.

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UNPUBLISHED

June 29, 2004

No. 246280

Macomb Circuit Court

LC No. 02-001211

Before: Murphy, P.J., and Jansen and Cooper, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I respectfully dissent from Section II A of the majority opinion, as I would find that the trial court erred in finding that the covenant not to compete was legally invalid. I concur with the majority in all other respects and, thus, I would affirm in part and reverse in part.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(10), summary disposition is proper when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allstate Ins Co v State*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003). This Court also reviews questions involving contract construction de novo. *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000).

On review de novo, I would find that the covenant not to compete, which was signed by defendant Gutierrez, is enforceable. Agreements not to compete are permissible in Michigan if they are reasonable. MCL 445.774a(1); *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). Pursuant to MCL 445.774a(1):

An employer may obtain from an employee an agreement or covenant which *protects an employer's reasonable competitive business interests* and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is *reasonable as to its duration, geographical area, and the type of employment or line of business*. To the extent any such agreement or

covenant is found to be unreasonable in any respect, a court may limit the agreement in order to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

Michigan law requires that we narrowly construe restrictive covenants. *United Rentals, Inc v Keizer*, 355 F3d 399, 408 (CA 6 2004).

The restrictive covenant in question provides:

I AGREE AND UNDERSTAND THAT I WILL NOT PERFORM ANY SERVICES FOR THE CLIENT DIRECTLY, OR INDIRECTLY, THROUGH ANOTHER AGENCY, INDIVIDUAL, ENTITY OTHER THAN “A COMPLETE HOME CARE” AGENCY, FOR A PERIOD OF SIX (6) MONTHS AFTER THE LAST DAY WORKED ON ANY OF YOUR ASSIGNMENTS.

I agree with the majority, with regard to its finding that a six-month duration is a reasonable time period and, thus, would not support the trial court’s grant of summary disposition. See *Superior Consulting Co v Walling*, 851 F Supp 839, 847 (ED Mich 1994). I would also find that the covenant is reasonable as to geographical area as it is limited to performance of services for plaintiff’s clients for which Gutierrez provided service. But I disagree with the majority’s finding that the restriction in the covenant is invalid as matter of law because it is unreasonably broad.

The restrictive covenant provides that Gutierrez will not “perform any services for the client.” A restrictive covenant, which does not allow an employee to perform services for a client with which that employee provided service for on behalf of the employer he or she is leaving, for a limited period of six months, is not unreasonable. This is a reasonable restriction as to “type of employment or line of business,” when read in context. A reading of the terms used in the covenant not to compete make it clear that the agreement was intended to prohibit Gutierrez from performing services for plaintiff’s clients, for which she had provided services for during her employment with plaintiff. It is apparent that the restriction is limited to the services Gutierrez provided through her employment with plaintiff. A provision, which limits Gutierrez from performing services for six-months on clients that she serviced for plaintiff was reasonable as to line of work, narrowly restricting services to clients that Gutierrez serviced for plaintiff. This restriction is reasonable in this field of work because Gutierrez and other employees are put in a unique position where they develop personal relationships with the client. Without such restriction an employee could make a deal with the client and provide services independently from the employer who put her in contact with the client or, as is the present situation, could leave and go to another agency and take the client to another agency. Plaintiff offered evidence supporting that when Gutierrez terminated her employment with plaintiff she continued performing the same services during the same shift for the client for defendant Atrium as she had on behalf of plaintiff. The provision did not restrict Gutierrez from working in “any capacity for a competitor,” see *Superior Consulting Co, supra* at 847, but instead only placed a restriction

that if she did work for other agencies or competitors she could not provide services for clients she worked for while employed by plaintiff for a limited period of six months.<sup>1</sup>

Gutierrez was free to compete in the field, she was just restricted from performing services for the “client” she serviced on behalf of plaintiff. Surely, Michael Boyagian was not the only individual in the area in need of home nursing care. The restrictive covenant did not prohibit plaintiff from gaining full time employment with benefits. Gutierrez was only restricted from performing services for clients she serviced on behalf of plaintiff; i.e., Boyagian.

In addition, the covenant at issue protected plaintiff’s “reasonable competitive business interests.” MCL 445.774a. The legitimate business interest is the retaining of clients and goodwill. This is clearly a reasonable competitive business interest under the circumstances of this case. Plaintiff places employees in the homes of clients where a situation is created in which it is the employee who develops the relationship with the client. If an employee leaves an employer and gains employment with another home care provider or decides to become an independent contractor it is a legitimate business concern that the client will follow the employee with which the client has developed a relationship. Clearly, this is the type of behavior the restrictive covenant was intended to prohibit.

In *Kelsey-Hayes Co v Maleki*, 765 F Supp 402, 407, vacated pursuant to settlement 889 F Supp 1583 (ED Mich 1991), the court provided:

[A] legitimate business interest . . . . must be something greater than mere competition, because a prohibition of all competition is in restraint of trade. To be reasonable, a covenant must protect against an employee gaining some unfair advantage in competition with his employer. Reasonable covenants may protect such legitimate interests as trade secrets, confidential information, close contact with the employer's customers or customer lists, or cost factors and pricing. An employer may *not* reasonably prohibit future use of general knowledge or skill.

Although, *Kelsey-Hayes Co*, *supra* has been vacated, the rationale was adopted by the court in *United Rentals, Inc v Keizer*, 202 F Supp 2d 727 (WD Mich 2002) affirmed 353 F3d 399 (2004) (“the employer's business interest justifying such a restrictive covenant must be greater than mere competition . . . . In order to be reasonable, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with his employer, but not prohibit the employee's future use of general knowledge or skill”). The legitimate business interest in the present case is clearly greater than mere competition as the personal relationship an employee develops with plaintiff’s clients creates an unfair advantage for employees in competition with plaintiff. The covenant in question protected plaintiff whose employees had close contact with

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<sup>1</sup> Even assuming that the phrase “any service for the client” is too broad the covenant should have merely been construed against plaintiff in favor of defendant such that “any service” was limited to the services Gutierrez provided to the client while she was employed by plaintiff. See *United Rentals, Inc, supra*, 355 F3d at 407, citing *Higgins v Lawrence*, 107 Mich App 178, 309 NW2d 194, 196 (1981).

clients and did not prohibit future use of general knowledge or skill. Gutierrez was free to use her general knowledge and skills anywhere and for anyone, except she was not allowed to provide service to clients she had serviced during her employment with plaintiff for a reasonable period of six months. Thus, the covenant not to compete included in Gutierrez's employment contract did not prohibit use of general knowledge and skill she had obtained by working for plaintiff. Therefore, the covenant not to compete that was included in the employment contract protected a reasonable competitive business interest of plaintiff for purposes of MCL 445.774a(1).<sup>2</sup>

For the above reasons, I would find that the covenant not to compete included in Gutierrez's employment contract is reasonable for purposes of MCL 445.774a, and should have been enforced. I would reverse the trial court's grant of summary disposition in favor of defendants with regard to plaintiff's breach of the covenant not to compete claim. I concur with the majority in all other respects and, thus, I would affirm in part and reverse in part.

/s/ Kathleen Jansen

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<sup>2</sup> In *Tower Oil & Technology Co v Buckley*, 99 Ill App 3d 637; 425 NE2d 1060, 1066-1067; 54 Ill Dec 843 (1981) (quoted and cited favorably in *In re Talmage*, 758 F2d 162, 165-166 (CA 6 1985)), the appellate court for another state provided that the "protection of an established clientele from takeover by a former employee as a legitimate interest. . . . neither the existence or misuse of a trade secret is required to enforce a restrictive covenant."